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December 18, 2000

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW Suite 700
Washington, DC 20423-0001

Re: Ex Parte No. 582 (Sub No. 1), Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed are an original and 25 copies of the Comments of the American Chemistry Council and American Plastics Council (CMA-4/APC-4). Also enclosed is a 3 ½" diskette containing the comments and verified statements in WordPerfect 5.x for Windows.

Please stamp the additional copy with the date of receipt and return with our messenger.

Sincerely,

Scott N. Stone

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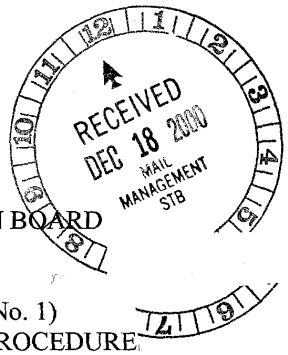

CMA-4
APC-4

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)
MAJOR RAIL CONSOLIDATION PROCEDURE

ORIGINAL

REPLY COMMENTS OF THE AMERICAN CHEMISTRY COUNCIL AND THE AMERICAN PLASTICS COUNCIL

The American Chemistry Council ("the Council") and the American Plastics Council ("APC") respectfully submit these joint reply comments in response to the revised merger rules ("the Proposed Rules") contained in the Board's Notice of Proposed Rulemaking served October 3, 2000 (the "NPR Decision") and published at 65 Fed. Reg. 58974 (October 3, 2000).

Executive Summary

The opening comments reflect a broad consensus that the Proposed Rules lack sufficient specificity to implement the Board's proposed new policy. While the Board's policy would favor mergers only if they both preserve and enhance competition, that policy can be implemented effectively only by promulgating in advance a set of consistent and predictable standards. Numerous parties, including the Council and APC, have offered proposals that would put teeth into the Proposed Rules. If there is to be a real shift towards more pro-competitive merger rules, the Board must choose which specific remedies it will impose to balance what would otherwise be the serious and unique harms to competition that would result from the

inevitable momentum towards two transcontinental systems, once the next major rail merger is proposed.

Discussion

The opening comments show broad agreement that the Proposed Rules are too vague and lack objective and predictable standards.[1] A fair summary of the comments, at least on the shipper side, is that the Board has articulated a substantial and welcome policy goal – that mergers should preserve and enhance competition – but has declined so far to adopt any specific remedies to ensure that this policy goal will be implemented. In other words, the Board aspires to a substantial change in principle while in practice offering little to date that goes beyond the status quo. Under the Proposed Rule, there would be no change to bottleneck policy, no change to the rules governing terminal or line access, and no material change regarding the imposition of conditions to preserve gateways. Instead, there would be a weighing by the Board of the pros and cons of a merger, including the competitive pros and cons, and a decision based upon that inevitably subjective weighing.

In light of the unique competitive harms that would be created by a transcontinental rail merger,[2] and the Board's recognition that further mergers could not be expected to generate

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[1] Even some of the rail parties agree that the rules should be made more specific. See, e.g., the Comments of the Kansas City Southern Railway Company at 5; Comments of the American Short Line and Regional Railroad Association at 1.

[2] As detailed in CMA-2/APC-2, the Joint Comments of the Council and APC filed May 16, 2000 (at 8-11), a transcontinental rail merger would severely reduce the competitive options of shippers who, like the members of the Council and APC, are usually captive at their origin plants but often have competitive alternatives routes to transcontinental destinations. Such alternatives would be foreclosed by a transcontinental merger because the merged system would, in the absence of meaningful merger conditions, insist upon keeping the traffic on its own system for the entire route. In addition, creation of a transcontinental duopoly would make it less likely that

efficiencies of the kinds seen in past mergers, the Council and APC in their May 16, 2000 joint comments proposed an "Access Condition" allowing each captive shipper on the merged system access to one additional rail carrier. In their most recent comments, the Council and APC made the alternative proposal to require the publication of market-driven proportional rates to gateways.[3] Either of these proposals would mitigate most of the competitive harms caused by further end-to-end rail mergers. But the Council and APC do not claim to have a monopoly on ideas about how to implement the pro-competitive policy of the Board. Numerous proposals suggested by other parties could fill the bill. For example, the Board should consider the following proposals for creating a meaningful pro-competitive merger policy:[4]

- DOT's and USDA's advocacy of keeping gateways open both physically and economically (Comments of the United States Department of Transportation at 5, Comments of the United States Department of Agriculture at 16)
- NITL's and TFI's proposed revisions to the language of the Proposed Rule designed to ensure that rail-to-rail competition be enhanced in all areas affected by rail mergers (Comments of the National Industrial Transportation League at 11-12, Comments of The Fertilizer Institute and the Canadian Fertilizer Institute at 7)
- ASLRRA's request that all paper and steel barriers be removed (Comments of the American Short Line and Regional Railroad Association at 3)

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competition would constrain rail rates, as economic studies have shown that prices are generally higher in two-competitor markets than in markets with more competitors.

[3] CMA-3/APC-3, Joint Comments of the American Chemistry Council and American Plastics Council filed November 17, 2000 and attached verified statement of Ed Kammerer.

[4] The Council's and APC's focus in these reply comments on pro-competitive conditions should not be interpreted as a lack of concern about other issues such as service assurance, arbitration of service disputes, and the recovery of acquisition premiums. The Council and APC note and endorse the comments of many other parties urging, as the Council and APC have urged, the strengthening of provisions dealing with those issues. The Council and APC believe, however, that effective rail to rail competition would be a better guarantor of acceptable service and reasonable rates than all the other conditions the Board might see fit to impose in a merger.

- Dow's and EEI's support for the publication of rates for bottleneck segments without requiring shippers to have contracts with the connecting carrier (Comments of Dow Chemical Company at 12, Comments of the Edison Electric Institute at 7-8)[5]

- Shell's position that merger conditions should include "structural changes which reduce the concentration of market power and increase competition for all affected shippers" (Comments of Shell Oil Company and Shell Chemical Company at 9)

- Weyerhaeuser's and Shell's suggestion that interswitching rules such as those in effect in Canada could be applied (Comments of Weyerhaeuser Company at 4-6; Comments of Shell Oil Company and Shell Chemical Company at 13)

- BASF's and Procter & Gamble's detailed proposals to amend the Proposed Rules to ensure a variety of forms of rail-to-rail competition to protect all shippers that would otherwise be affected by the merger (Comments of BASF Corporation, Verified Statement of Tom O'Connor at 13, Comments of Procter & Gamble Company at 2-4)

- The call by several parties for greater use of terminal access and reciprocal switching remedies. (e.g., Comments of The Fertilizer Institute and the Canadian Fertilizer Institute at 7-8, Comments of the Greater Houston Partnership at 3, Comments of the Edison Electric Institute at 8)

For the railroads' part, the AAR asserts that "AAR believes market-based competitive rivalry is in the public interest," and suggests that the railroads' own initiatives will result in more vigorous competition.[6] This assertion is at odds with reality, because long experience shows that railroads will do only the minimum necessary to comply with whatever pro-competitive standards and conditions are adopted. For example, if gateways are required to be kept open, but without specifying that rates to those gateways must not competitively

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[5] As the Council and APC have stated, however, ensuring the availability of increased competitive choices is preferable to requiring resort to rate challenges; hence a change to the bottleneck rate policy would not be the preferred solution. Because of the difficulty and expense of formal litigation at the Board, the Council and APC endorse the position of numerous parties who call for increased use of alternative dispute resolution including arbitration. See, e.g., Comments of The Fertilizer Institute and the Canadian Fertilizer Institute at 8-9, Comments of E.I. Du Pont de Nemours and Company at 7.

[6] Comments of the Association of American Railroads at 1-2.

disadvantage the gateways, then railroads will keep the gateways nominally open while imposing rates and charges that make the non-preferred gateways uneconomic.[7] As another recent example, it has required repeated litigation at the Board to force Union Pacific to permit access to BNSF under conditions imposed in the UP/SP merger.[8] Moreover, railroads almost always promise more in merger applications than they deliver.[9] Hence, the Board needs to adopt and impose specific rules, and those rules will directly translate into the way railroads behave and the choices shippers have. There is no prospect that railroads will further the spirit of the new mergers rules by offering any more competition than the Board requires of them.

Indeed, the opening comments of railroad parties steadfastly oppose any change in the rules governing competition-preserving conditions. This position is summarized by the AAR:

> AAR urges the Board to modify its proposed new policy to provide that it will recognize as a benefit enhanced competition that flows from the voluntary initiatives of merger applicants but will not impose conditions unrelated to the effects of a merger as a prerequisite for merger approval. The latter requirement is both onerous and unwise. It would treat railroads more harshly than any other U.S. industry and jeopardize the very public interest that the Board is charged with protecting.[10]

If the railroad industry truly wants to be treated like other US industries, of course, the most logical step is to apply to railroads the same antitrust and merger review standards applied

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[7] See also the Verified Statement of Edward Kammerer filed with the opening comments of the Council and APC, CMA-3/APC-3.

[8] See, e.g., the disputes over access to Four Star Sugar Company in Fin. Dkt. No. 32760, Union Pacific Corp., et al. -- Control and Merger – Southern Pacific Rail Corporation et al., Decision No. 86 served July 12, 1999; over access to Entergy Service's White Bluff plant, Id., Decision No. 88 served March 21, 2000; and over access to AmerenUE's plant in Labadie, Mo., Id., Decision No. 89 served June 1, 2000.

[9] See, e.g., Comments of Shell Oil Company and Shell Chemical Company at 8 ("the consolidated carrier discovers that its shippers actually have less access to rail to rail competition on one end of the haul or the other so the need to share merger savings is not quite so pressing").

[10] Comments of the Association of American Railroads at 2.

to every other industry except Major League Baseball. But plainly that is not what the rail industry wants.[11] Instead, at a time when the rail industry is more concentrated than ever before in US history, and is contemplating a consolidation into two giant transcontinental systems, the industry asks, with minor exceptions, to maintain the status quo in merger review. With due respect, the railroads should not be allowed to have it both ways. They should be subject to the same antitrust standards as other industries. If not, in exchange for their sheltered, antitrust-exempt status, they should accept the types of specific pro-competitive conditions suggested by the various parties to this proceeding.

The Council and APC continue to believe that jurisdiction for rail merger review should be shifted to the United States Department of Justice, which has detailed standards for merger review and extensive experience reviewing mergers in both regulated and unregulated industries, including mergers and marketing alliances among transportation companies. There is no reason that the rail industry should continue to be singled out for special treatment notwithstanding that it already resembles the classic heavily consolidated industries that provoked the enactment of the original antitrust laws – monolithic, unresponsive to the customer, and too often offering take-it-or-leave it terms.

If jurisdiction is not shifted to the Department of Justice, the Board must adopt specific rules with teeth. A standard that says "we'll know what's enough competition when we see it" is no standard at all. And standardless decisionmaking has long been synonymous with arbitrary

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[11] The BNSF cites favorably the procedural timetables achieved by the US Department of Justice and Federal Trade Commission in their merger reviews in other industries. (Comments of Burlington Northern Santa Fe Railway Company at 19.) But no rail carrier's comments advocate application of the substantive standards of the US antitrust laws.

decisionmaking. The railroad industry is too central to the United States economy to be left to this type of ad hoc merger review.

Respectfully submitted,

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Dated and Due: December 18, 2000

CERTIFICATE OF SERVICE

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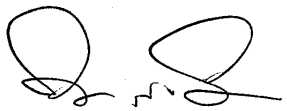

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